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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 880

WILLIAM LEV and BENJAMIN DANIS,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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Statement

This brief is submitted in reply to the Brief for the United States in Opposition to the petition for a writ of certiorari herein. It shall deal solely with the points raised in Paragraph "1" of the "Argument" in the said Brief in Opposition.

1. The admission into evidence of the portions of Battaglia's pre-trial statements read by the Government on re-direct examination does not properly fall within the doctrine of "verbal completeness".

The purpose of the said doctrine is to permit a fair and accurate understanding of an utterance to be given to the trier of the facts where only a selected fragment thereof, which standing alone ascribes an incomplete, inaccurate

or unfair meaning to that utterance has been previously introduced by one side. It is invoked "in order to secure for the tribunal a complete understanding of the total tenor and effect of that utterance". (7 Wigmore, Evidence, 3rd ed., 1940, Sec. 2113, p. 523.)

The doctrine has definitely prescribed limitations so that "the opponent shall not under the cloak of this conceded right, put in utterances which do not come within its principle and would be otherwise irrelevant and inadmissible". (7 Wigmore, Evidence, 3rd ed., 1940, Sec. 2113, p. 524.)

These limitations of the doctrine are enumerated by Wigmore as follows:

> "(a) No utterance irrelevant to the issue is receivable;
>
> (b) No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable;
>
> (c) The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony." (7 Wigmore, Evidence, 3rd ed., 1940, Sec. 2113, p. 524.)

The Government's purported definition of the said doctrine (pp. 7, 8) is entirely too broad and all encompassing and does not fall within the rule enunciated by Wigmore or any controlling decision of the federal courts.

Wigmore significantly does not speak of a "statement", but advisedly uses the term "utterance". The Government by using the term "statement" thus conveys the impression that the rule pertains to an entire document rather than to select portions thereof. In fact, the very purpose of the rule is to deal with the use of such selected portions or "utterances" rather than with a complete document.

A statement—particularly one embodying a confession as in the instant case—may deal with a great number of distinct aspects of the criminal conduct charged. It does not follow that because defense counsel cross-examines the declarant as to one such aspect of the statement, that the introduction of the remainder of the statement concerning all other aspects of the transaction is necessary in order to explain or clarify the portion introduced by the defense. Indeed, only such portions of the remainder as specifically deal with the aspect of the transaction originally received in evidence and explain, clarify or qualify same, are properly admissible. Such is the proper limit and extent of the doctrine of completeness and all that is necessary to guarantee the element of fair presentation that lies at the root of the doctrine. (See *United States* v. *Grunewald*, 164 F. 2d 644.)

In the instant case, the Government admits (p. 8) that the portion of Battaglia's pre-trial statements read on re-direct examination with reference to Battaglia's December, 1956 entry, dealt with matter other than that which was used by the petitioners' counsel on cross-examination. The portion of the said pre-trial statements read on re-direct examination had absolutely no bearing on the question of payment, which was the sole matter involved in the portion used on cross-examination. The Government thus, in effect, contends that by cross-examining as to one aspect of Battaglia's arrival in December, 1956, the defense opened the door to the Government reading into evidence all matter contained in Battaglia's pre-trial statements having bearing upon any and all aspects of the said arrival. This contention far transcends the proper limitations of the doctrine of "verbal completeness" and served to admit into evidence matter that did not explain, clarify or qualify the portions used on cross-examination and that was extremely damaging, highly prejudicial and not otherwise admissible.

The said divergence between the matter read on cross-examination and the matter read on re-direct examination

by the Government with respect to Battaglia's December, 1955 entry is also readily ascertainable from the record.

It is not disputed that the portions of Battaglia's pre-trial statements which were read by the Government on re-direct examination constituted post-conspiracy statements made by a co-conspirator who had pleaded guilty and was not on trial. The said statements were made subsequent to the termination of the conspiracy and were not in furtherance of its objects. It was these statements, that have long been recognized by this Court as being highly prejudicial and inadmissible, which were thus received in evidence under the guise of the doctrine of "verbal completeness".

In discussing the right to introduce the remainder of an utterance, McCormick states:

> "This is subject to the qualification that where the remainder is incompetent, not merely as to form as in the case of secondary evidence or hearsay, but because of its prejudicial character then the trial judge should exclude if he finds that the danger of prejudice outweighs the explanatory value." (McCormick on Evidence, 1954, Section 56, p. 132.)

The prejudicial character of these post-conspiracy statements that were read on re-direct examination is apparent. Indeed, in the instant case, they had no explanatory value whatsoever.

The cases cited by the Government (p. 8) in support of its premise are in no way controlling of the instant case. The *Short*, *Affronti* and *Katz* cases do not involve the crime of conspiracy at all. The *Apuzzo* case, while containing a conspiracy count, did not involve the admission of post-conspiracy statements by a co-conspirator.

In *United States* v. *Apuzzo*, 245 F. 2d 416 (C. A. 2), the Court of Appeals sustained the action of the trial judge

in permitting a Government witness to complete an answer to a question that had been propounded to him on cross-examination. Defense counsel had asked for the conversation between the witness, a Government Agent, and the defendant at the time of the arrest. When it became apparent that the witness would relate an admission by the defendant as to a previous arrest on a similar charge, counsel made a questionable attempt to cut off the answer. The trial judge, however, permitted the witness to complete his answer and relate the defendant's admission of his previous arrest. Thereafter, the Court directed the jury to disregard the answer and repeated such instruction in its charge. The majority opinion affirmed the conviction upon "the fundamental principle of evidence that a party by asking a broad question of the kind here involved may not object to the admission of the response he draws". It went on to comment that the Government could properly have adduced the complete answer on re-direct examination under the doctrine of "verbal completeness".

It is interesting to note, however, that three of the five members of the Court, sitting *en banc* held the admission of the disputed testimony to be error.

This decision, however, in no way involved such use of the doctrine of "verbal completeness" as found in the instant case. To permit a witness to properly complete his answer to a broad question is in no way comparable to the admission of post-conspiracy statements which in no way qualify, clarify or explain the portions of those statements used on cross-examination.

In *Short* v. *United States*, 217 F. 2d 73 (C. A. 9), a non-conspiracy case, the defendant's counsel sat by without taking any objection while the Government read ten pages of a Government Agent's report to the jury on re-direct examination. The Court of Appeals held that the portions so read only referred to the defendant in a very unsubstantial manner and did not constitute reversible error.

In the instant case, defense counsel made repeated objections to the introduction of the post-conspiracy statements and their conduct could in no way have been deemed to have been a consent to the receipt of such statements in evidence. As distinguished from the *Short* case, the post-conspiracy statements in the instant case directly linked the petitioners to the alleged conspiracy and cannot be said to have been unprejudicial.

In *Affronti* v. *United States,* 145 F. 2d 3 (C. A. 8), a non-conspiracy case, the Court permitted the Government to read prior consistent statements of the witness on re-direct examination where his credibility had been questioned by the defense on cross-examination. When the defendant's counsel had originally requested the witness' reports on cross-examination, he had stated that he would offer the said reports in evidence. The reports were made prior to the arrest of the defendant and no motive for fabrication was shown to have existed at the time. In the instant case, however, Battaglia's post-conspiracy statements were made subsequent to the time of his arrest and his motive to fabricate did then exist. In addition, the petitioners' counsel at no time offered to introduce the said pre-trial statements into evidence. The circumstances of the *Affronti* case were, therefore, markedly different from those of the instant case, and the *Affronti* case is thus in no way controlling upon the instant case.

In *Katz* v. *United States,* 178 F. 2d 116 (C. A. 3), a non-conspiracy case, defendant's counsel, in questioning a witness, repeatedly brought out that the defendant had been acquitted in a prior criminal case. The Government was thereafter permitted to introduce the indictment and the circumstances surrounding the prior case to show that it was a distinct and separate matter upon which the defendant had been acquitted.

It was held that the introduction of the said evidence by the Government was proper to explain any adverse

inferences which might have arisen from the fragmentary or incomplete character of the evidence introduced with respect to the prior indictment by the defense. In the instant case, no such fragmentary or incomplete matter was introduced by the defense on cross-examination and the portions of Battaglia's post-conspiracy statements read by the Government on re-direct examination in no way clarified or explained the said matter.

None of the above mentioned cases cited by the Government are thus controlling upon the instant case in any respect. None of the said cases permitted the introduction of such damaging and prejudicial testimony as that herein involved.

The Brief in Opposition has completely failed to distinguish the controlling authority of *Seeman* v. *United States*, 90 F. 2d 88 (C. A. 5), and *Holt* v. *United States*, 94 F. 2d 90 (C. A. 10), which held that where the declarant himself is not on trial, his post-conspiracy statements are not admissible for any purpose.

The Government has similarly completely failed to distinguish the controlling authority of *Dowdy* v. *United States*, 46 F. 2d 417 (C. A. 4), and *United States* v. *Toner*, 173 F. 2d 140 (C. A. 3), which held that it was reversible error to admit post-conspiracy statements of a witness which corroborated his prior direct testimony.

In the instant case, the said portions of Battaglia's post-conspiracy statements which were read to the jury on re-direct examination contained such self-serving corroboration of his own prior direct testimony.

The Government has further completely failed to address any argument to the permissible scope of the co-conspiracy exception to the hearsay rule as set forth by this Court in *Krulewitch* v. *United States*, 336 U. S. 440, and the apparent broadening of that scope as sanctioned by the decision of the Court of Appeals herein.

Finally, the Government has not addressed itself at all to the question of the purpose of Title 18, United States Code, Section 3500, as enunciated by this Court in *Palermo* v. *United States*, 360 U. S. 343, 345, and the apparent conflict of the decision of the Court of Appeals herein with reference thereto.

The relaxation of the rules of evidence in conspiracy cases has been great enough as is, without the floodgates being thrown wide open through such use of the doctrine of completeness as the Government seeks to have sanctioned here.

It is respectfully submitted that all of the points hereinabove set forth furnish important and compelling grounds for the issuance of a writ of certiorari by this Court.

CONCLUSION

For all of the foregoing reasons as well as those stated in the petition for a writ of certiorari, it is respectfully submitted that the application for a writ of certiorari should be granted.

Dated: New York, New York, May 24th, 1960.

Respectfully submitted,

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